

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 202 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and

MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed
to see the judgement? - YES

2. To be referred to the Reporter or not? - YES

3. Whether Their Lordships wish to see the fair copy
of the judgement? - NO

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? - NO

5. Whether it is to be circulated to the Civil Judge?
- NO

ANVARKHAN A PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR CH VORA for Petitioner

MR KP RAVAL, APP for Respondent

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 06/10/98

ORAL JUDGEMENT (per J.N.Bhatt, J.)

The short question which has surfaced in this appeal for our consideration is, as to whether the conviction of the appellant and sentence for the offence punishable under Section 20(b)(ii) read with Section 31 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), by virtue of the impugned judgment and order dated 24.11.1992, recorded by the learned Sessions Judge, Kutch at Bhuj, in Sessions Case No.46 of 1988 is vulnerable, in view of the provisions of Section 50 of the NDPS Act?

The prosecution case has been that, the appellant original accused, on being carried out raid on 16.9.1986 at about 11.30 a.m. in the Office of the Mamlatdar, situated in the city of Bhuj, was found possessed of contraband article like Charas, weighing about 10 gms. The raid was effected by a raiding party headed by PSI Mr.R.S.Sharma, upon prior information that the accused who had gone to attend the Office of the Mamlatdar, at Bhuj, on 16.9.1986, was in possession of contraband article Charas. When PSI Mr.Sharma of Bhuj City police station, upon such prior information, in presence of panchas, searched the person of the accused when he was in the Office of the Mamlatdar, at Bhuj, and was found to be in possession of 10 gms. of Charas, which had been recovered from the right side pocket of the pant of the accused. There were about seven polythene bags in which the Charas in the form of tablets was seized and the accused was found to be in illegal possession of the same as he was not having any permit. After drawing the necessary panchnama of the seizure and arrest, the sample of muddamal contraband article was sent to Forensic Science Laboratory (FSL) and it was reported that the said article was prohibited Charas. Therefore, the accused was sent up for trial before the Sessions Court, Kutch, at Bhuj, against whom a charge was framed on 2.11.1992 for the offence punishable under Section 20 of the NDPS Act for the illegal possession of the contraband article Charas, to which he denied and claimed to be tried.

The prosecution relied on the evidence of the following six prosecution witnesses:

- (1) Anvar Jusuf Memon Exh.5
- (2) Ibrahim Lalmahmad Gagada Exh.6
- (3) Rakeshkumar Shivdayal Sharma Exh.7
- (4) Ramjibhai Nathabhai Exh.11
- (5) Samantsinh Madasinh Jadeja Exh.12
- (6) Dayaram Nekram Yadav Exh.13

The prosecution also placed reliance on the following

documentary evidences:

- (1) Complaint Exh.8
- (2) Yadi written to Laboratory Exh.9
- (3) Panchnama Exh.10
- (4) FSL report Exh.14

Upon the examination and assessment of the evidence of the prosecution, by the trial Court, the impugned judgment of conviction followed, finding the accused guilty of the offence punishable under Section 20(b)(ii) read with Section 31 of the NDPS Act, as the accused was also held guilty of similar offence, and as a result of which, the accused came to be sentenced to undergo RI for 15 years and to pay fine of Rs.1,50,000/-, in default, to undergo further RI for 1-1/2 years, which is, precisely, under challenge, at the instance of the original accused appellant before us, by invoking the provision of Section 374(2) of the Code of Criminal Procedure, 1973 (Code).

The learned Advocate for the appellant has drawn our attention to the provisions of Section 50 of the NDPS Act and the relevant material facts on record and has contended that there is a breach and violation of the mandatory provisions of Section 50 of the NDPS Act, as a result of which, the entire trial stands vitiated, being illegal.

We have, extensively, examined the entire testimonial collection and the documentary evidence, and the relevant proposition of law in general, and Section 50 of the NDPS Act, in particular, and we have found that the raiding party headed by PSI Mr.Sharma did not comply with the provisions of Section 50 which are mandatory.

It would be expedient, at this stage, to refer to Section 50 of the NDPS Act, which reads as under:

- "50. Conditions under which search of persons shall be conducted. - (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.
- (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate

referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female."

It is a settled proposition of law that the provisions of Section 50 of the NDPS Act prescribe conditions under which the search of a person shall be conducted are mandatory and non-compliance thereof would, obviously, vitiate the trial. There is no doubt about the fact that PSI Mr.Sharma who undertook the exercise of search of the accused and seizure of the article, did not follow the procedure prescribed in Section 50 of the NDPS Act. He had not informed the accused that he is entitled to be searched in presence of a Gazetted Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate. Mr.Sharma who conducted the search and seizure was, admittedly, an officer duly authorised under Section 42 and he was, therefore, obliged to comply with the conditions of Section 50 which demand that the authorised officer under Section 42 of the NDPS Act should inform the accused about his right to be searched in presence of a Gazetted Officer or a Magistrate and, admittedly, this mandatory provision had not been followed. Therefore, the whole trial shall stand vitiated, being illegal.

The proposition of law which we have adhered to hereinabove has been, succinctly, expounded and explored in catena of judicial pronouncements by now, commencing right from the decision of the Apex Court rendered in the case of STATE OF PUNJAB v. BALBIR SINGH, reported in AIR 1994 SC 1872. It has been laid down in the said decision that the provisions of Section 50 are mandatory. On prior information, the empowered officer acting under Section 42 should comply with the provisions of Section 50, which are mandatory in nature. It is an imperative requirement on the part of the intending officer to search the person to be searched of his right, if he so chooses, and he will be searched in presence of a Gazetted Officer or a Magistrate. In the present case, the raiding party headed by PSI Mr.Sharma and one other Constable did not inform the accused about his such right as required under Section 50 of the NDPS Act, as a result of which, there had been an infraction of the material

condition laid down in Section 50 and as the provisions of Section 50 are mandatory, the net result would be the whole trial shall be vitiated. Upon this admitted fact and the settled proposition of law in the case of Balbir Singh (supra), we are left with no other alternative but to admit the accused to the benefit of Section 50 as there was violation thereof and the resultant effect would be the whole trial shall stand illegal, the conviction, the resultant sentence also shall be illegal.

In the result, the judgment and order recorded by the ld. Sessions Judge, Kutch at Bhuj, in Sessions Case, No.46 of 1988, on 24.12.1992, shall stand quashed and set aside. Incidentally, it may also be mentioned that the provision of Section 31, otherwise also, would not be applicable in the present case, as the previous order of conviction which was passed for enhanced sentence under Section 31 came to be quashed and set aside in Criminal Appeal No.150 of 1992, on 24.9.1996 by this Court (Coram: N.J.Pandya & R.Balia, JJ.). In any case, we are satisfied that the conviction and resultant sentence under Section 20(b)(ii) read with Section 31 of the NDPS Act would not be justified. Therefore, the appeal is allowed. The impugned judgment and order recorded by the ld. Sessions Judge, Kutch, at Bhuj, in Sessions Case No.46 of 1988, on 24.11.1992 shall stand quashed and set aside. The appellant-accused shall be released forthwith, if not required any other case. The amount of fine as directed by the trial Court has not been paid, and therefore, there is no question of passing any order with regard to refund of fine.

sreeram.